Supreme Court, U. S.
FILED
JUL 19 1979
MICHAEL RODAK, JR., CLERK

No. 78-1806

# In the Supreme Court of the United States

OCTOBER TERM, 1978

G. T. BRANDON AND BRANDON BROTHERS USED CARS, INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*

JOHN H. SHENEFIELD
*Assistant Attorney General*

JOHN J. POWERS, III
ANDREA LIMMER
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1806

G. T. BRANDON AND BRANDON BROTHERS USED CARS, INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

Neither the opinion of the court of appeals (Pet. App. 19-20) nor the memorandum opinion of the district court on petitioners' suppression motion (App., *infra*, 1a-2a)[1] is reported.

### JURISDICTION

The judgment of the court of appeals was entered on May 3, 1979. The petition for a writ of certiorari was filed

[1]"App." refers to the appendix to this brief. "Pet. App." refers to the appendix to the petition. "Supp. App." refers to the supplemental appendix filed in the court of appeals.

on June 4, 1979, and is therefore out of time under Rule 22(2) of the rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether vehicle identification numbers and odometer readings, visible through the windows of automobiles parked on an open used car lot, were obtained by FBI agents in violation of the Fourth Amendment.

2. Whether grand jury testimony, which was not used directly or indirectly as evidence at trial, was "compelled" in violation of the Fifth Amendment where the witness was not required to answer questions put to him but chose voluntarily to respond.

## STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioners Brandon Brothers Used Cars, Inc. and its president, G. T. Brandon, were convicted on two counts of a three-count indictment for violating the Odometer Fraud Law, 15 U.S.C. 1984 and 1990c.[2] The corporate defendant was

---

[2]15 U.S.C. 1984 provides:

> No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon.

15 U.S.C. 1990c provides:

> (a) Any person who knowingly and willfully commits any act or causes to be done any act that violates any provision of this subchapter or knowingly and willfully omits to do any act or causes to be omitted any act that is required by any such provision shall be fined not more then $50,000 or imprisoned not more than one year, or both.

fined $2,500 on each count; G. T. Brandon was fined $5,000 and sentenced to 45 days on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. 19-20).

Petitioners buy and sell used automobiles (Pet. App. 19). Uncontested evidence at trial established that the three vehicles named in the three separate counts of the indictment had been purchased by petitioners and that, after the purchase, their odometers had been altered (Supp. App. 228-229, 241, 270-275, 321). Petitioners' contention was that the vehicles, which were concededly on petitioners' property when their odometer readings were recorded by federal agents,[3] had been sold to Jackie Brandon, a cousin of petitioner G. T. Brandon, prior to the alterations (Pet. 5-6). This contention, however, was refuted by petitioners' own records (Supp. App. 292-295, 299-300).

---

(b) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of any section of this subchapter shall be subject to penalties under this section without regard to any penalties to which that corporation may be subject under subsection (a) of this section.

[3]The odometer readings were obtained by two special agents of the Federal Bureau of Investigation who entered petitioners' used car lot to serve subpoenas issued by a federal grand jury investigating odometer tampering (Supp. App. 160-164). While one agent served the subpoenas, the other inventoried the cars on the lot by noting their year and model numbers. The vehicle identification numbers and the odometer readings were obtained by looking through the windshield and windows of each car (*id.* at 161). The agent taking down the numbers testified that he did not recall having opened the doors of any cars on the lot, with the possible exception of several cars that petitioner G. T. Brandon expressly authorized the agents to examine (*id.* at 161-163, 167).

## ARGUMENT

The decision of the court of appeals, on which we generally rely, is correct and does not conflict with any decision of this Court or any other court of appeals.

1. Petitioners contend (Pet. 9-12) that their Fourth Amendment rights were violated when federal agents recorded the vehicle identification numbers and the odometer readings on petitioners' vehicles. As the court of appeals observed, however, the vehicles were located on "a commercial establishment open to the public" and the information was obtained simply by looking through the windows of each vehicle (Pet. App. 20).[4] Moreover, the agents were never asked to leave the lot even after the purpose of their visit was explained (*ibid.*). Indeed, petitioner G. T. Brandon aided the agents by indicating which cars were his, and he denied ownership of the three vehicles subsequently named in the indictment (Supp. App. 162-163, 289-290). In these circumstances, the court of appeals correctly concluded that no constitutionally protected privacy interest was violated. See, *e.g.*, *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978); *G. M. Leasing Corp.* v. *United States*, 429 U.S. 338, 351-352 (1977); *South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 (1976); *Air Pollution Variance Bd.* v. *Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974); *Katz* v. *United States*, 389 U.S. 347, 351 (1967); *Hester* v. *United States*, 265 U.S. 57, 59 (1924).

2. Petitioners also argue (Pet. 13-16) that government counsel's questioning of G. T. Brandon before the grand

---

[4]The district court observed that there were "no fences or signs to exclude the public" (App., *infra*, 1a). The physical appearance of the lot thus refutes petitioners' contention that the public was excluded because sales were made only to wholesalers (Pet. 11). Moreover, as petitioners concede (Pet. 9), retail sales were made occasionally.

jury violated his Fifth Amendment rights. This argument is based on a district court order compelling G. T. Brandon to answer six questions before the grand jury. Petitioners interpret this order as precluding government counsel from asking any questions other than the questions listed in the order (Pet. 13).

Petitioner G. T. Brandon appeared before the grand jury on three separate occasions prior to the entry of the order in question. In response to his erratic claims of privilege (Pet. App. 20) and his refusal to identify corporate documents that had been subpoenaed by the grand jury, government counsel obtained an order compelling him to answer six listed questions regarding the identity of corporate documents. The order did not compel him to answer any additional questions. During his fourth grand jury appearance, Brandon answered the questions listed in the order and additional questions as well.[5]

Government counsel violated neither the court's order nor Brandon's Fifth Amendment rights. The order did not preclude Brandon from voluntarily answering other questions, nor did it prohibit the government from pursuing other lines of inquiry. The Constitution does not forbid government counsel from asking incriminating questions of grand jury witnesses, even if those witnesses are targets of the grand jury's inquiry; and it does not preclude a witness from answering such questions voluntarily. *United States* v. *Mandujano*, 425 U.S. 564,

---

[5]He initially invoked his Fifth Amendment privilege with respect to some of the additional questions not listed in the court's order. After conferring with his attorney, however, he also answered these questions (Supp. App. 85-86).

574-575, 581 (1976).[6] In any event, petitioners could not have been prejudiced by Brandon's grand jury testimony because that testimony was not introduced at trial and was not used to obtain other evidence.[7]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

JOHN H. SHENEFIELD
*Assistant Attorney General*

JOHN J. POWERS, III
ANDREA LIMMER
*Attorneys*

JULY 1979

---

[6]The court of appeals correctly distinguished this case from *United States* v. *Doss*, 563 F. 2d 265 (6th Cir. 1977), (cited at Pet. 12-13), which involved a witness who had been secretly indicted and was then called to testify before the grand jury about those very crimes. As the court noted in *Doss*, the grand jury's function terminates with the indictment. 563 F. 2d at 276. Brandon, on the other hand, although a possible target of the grand jury investigation, had not been indicted at the time of his appearance.

[7]The evidence at trial consisted of the information obtained by FBI agents and the testimony of the dealer who sold the cars in question to Brandon. In a statement filed in the district court, the government represented that the dealer's name was obtained from Jerry Walker, a former Brandon employee whose name was already known to the government before Brandon testified.

## APPENDIX

**MEMORANDUM OPINION AND ORDER**—Entered and Filed June 7, 1978

The Court has considered the evidence presented at the hearing on the suppression motion of the defendant, as well as the memoranda of counsel. The Court concludes that the evidence of vehicle identification numbers and odometer readings obtained by the FBI agents on December 13, 1977, should not be suppressed.

The Court has noted the "open fields" doctrine as announced in *U.S.* v. *Hester,* 265 U.S. 57 (1924), and cases thereafter. But, we believe that the doctrine is merely a forerunner of, and is subsumed in, the more recent concept of "reasonable expectation of privacy", *Katz* v. *U.S.,* 389 U.S. 347 at 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). We no longer deal with property law concepts. See *Wattenburg* v. *U.S.,* 388 F. 2d 853 (9th Cir. 1968).

Public access seems to be an important factor in such cases. See *Air Pollution Variance Board* v. *Western Alfalfa Corporation,* 416 U.S. 861 (1974). Here, there was no showing that the public was excluded from the premises, although there may have been no business which the public at large could have transacted there. There are no fences or signs to exclude the public. In the final analysis, the Court finds that there was no subjective expectation of privacy on the part of the defendant as to the exteriors of the vehicles on the lot or as to so much of the interiors as could be observed from outside the vehicles. Further, any such expectation would have been objectively unreasonable.

It is therefore Ordered that the defendant's motion to suppress be Overruled.

(s) Edward H. Johnstone
Judge, United States District Court

Dated: June 6, 1978.